IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5535 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARINARAYANSHA RUDALSHA TAILI

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 5535 of 2004

MR PRAVIN GONDALIYA for Petitioner No. 1

MS HB PUNANI, LD. AGP for Respondent No. 1-2,4

RULE SERVED for Respondent No. 1-2

MR JITENDRA MALKAN for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 21/12/2004

ORAL JUDGMENT

Heard Mr.P.S.Gondaliya, learned counsel appearing

for the petitioner; Mr.Jitendra Malkan, learned senior standing counsel appearing on behalf of the respondent -Union of India and Ms.H.B.Punani, ld.AGP, appearing on behalf of the respondent-State. The reply affidavits filed by the respondent-State as well as respondent-Union of India tendered today by Ms.Punani and Mr.Malkan are taken on record. The respondent-State has produced some annexures i.e. documents referred to in the reply affidavit and they are also considered by the Court.

2. The present petition is filed under Article 226 of the Constitution of India. The petitioner has challenged legality and validity of the order of detention dated 18th March, 2004, passed by the District Magistrate, Banaskantha at Palanpur, under the purported exercise of powers vested with the Detaining Authority under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as 'the Act'). It is recorded by the Detaining Authority that it is essential to pass order keeping the petitioner under preventive detention because the petitioner acts adversely to the security of the State-Gujarat as well as country-India. For recording this subjective satisfaction and committing the accused to the Central Prison, Sabarmati, Ahmedabad, the Detaining Authority has recorded detailed reasons and these reasons have been conveyed/communicated to the petitioner-detenu when the impugned order came to be executed. Thus, grounds that were found adequate to pass the order of detention are there on record at Annexure-B. The Detaining Authority for passing the orders has mainly considered the fact of registration of an offence punishable under Sections 3 and 9 of the Official Secret Act r/w. Section 120(B) of the Indian Penal Code by the Deesa Police Station being C.R. No.I-139 of 2003. The offence is registered on 15th September, 2003 and the petitioner was arrested by the concerned police on that very day.

3. The order of preventive detention dated 18th March, 2004, was executed and served to the petitioner-detenu when the petitioner-detenu was in judicial custody, after his arrest on 15th September, 2003.

4. The order of detention is assailed by the present petitioner on various grounds mentioned in para:4 of the memo of the petition. However, Mr.Gondaliya has focused his arguments mainly on two grounds. The first ground pressed into service by Mr.Gondaliya is that the petitioner on the day of passing the order of preventive detention i.e. on 18th March, 2004, was very well in judicial custody and by that time, his request to grant

bail was also turned down by the competent Court. So there was no need for the Detaining Authority to pass an order of preventive detention and, therefore, such an order can be said to be an order passed mechanically and without application of mind. So the same should be turned down on this sole ground.

5. The second point pressed into service by Mr.Gondaliya is that the impugned order normally should be passed very promptly and without unreasonable delay. In the cases where delay is caused in passing the order of preventive detention, the entire period of delay should be reasonably explained by the Detaining Authority and sponsoring authority. In support of this submission, Mr.Gondaliya has drawn the attention of the Court to the date of registration of the offence i.e.15th September, 2003 and the date of passing order of preventive detention i.e.18th March, 2004. According to Mr.Gondaliya, the delay of about six months caused in passing the order of detention is not convincingly explained by any of the authorities, who have submitted their affidavits today.

6. Mr.Gondaliya, learned counsel appearing for the petitioner, has also tried to develope various grounds and there is strong resistance by Mr.Malkan, learned senior standing counsel as well as Ms.H.B.Punani, ld. AGP. It is submitted that accepting prima facie case, the bail plea of the present petitioner has been turned down, which has been accepted by the learned counsel appearing for the petitioner and the petitioner is facing serious charge. So the activity of the petitioner against the interest of the country and also the State, obviously, can be said to be an activity against the maintenance of public order and the petitioner is not entitled to take advantage of the ratio laid down by this Court in the case of Sohanlal Surjaram Visnoi v. State of Gujarat, reported in 2004(2) GLR 1051. It is submitted that the registration of a solitary offence pending either under Bombay Prohibition Act or under Indian Penal Code should be considered as materially different than the prosecution of the type that has been pending against the petitioner. In the very cited decision also, the observation of this Court does not say that in each case where the detention order is passed relying upon a solitary case, such an order should be turned down on technical point only.

7. I have considered various submissions made by the learned counsel appearing for the parties but it is not necessary to enter into merits of other grounds that have

been argued, except the one i.e. the first point canvassed by Mr.Gondaliya. There is some force in the arguments of Mr.Gondaliya that as the petitioner was in judicial custody on 18th March, 2004 and his bail plea was turned down by the competent Court, there was no need for the Detaining Authority to pass an order of preventive detention. In support of this argument, Mr.Gondaliya has placed reliance on the ratio of the decision in the case of Amrutlal v. Union of India, reported in AIR 2000 SC 3675. Mr.Gondaliya has also pointed out 'n' number of decisions of this Court and of the very Bench where this Court has set at liberty the detenus who were ordered to be detained by formal order of preventive detention, though they were in judicial custody at the relevant point of time.

8. The observations of the Apex Court in the case of Dharmendra Suganchand Chelawat and anr. v. Union of India and ors., reported in AIR 1990 SC 1196, also would help the present petitioner is the submission of Mr.Gondaliya. In the cited decision, the Apex Court has observed that when the bail application was rejected few days prior to passing of the order of preventive detention, the apprehension that the detenu is likely to be released from the custody and if released, he shall continue his activities, is not a reasonable apprehension. According to Mr.Gondaliya, the present petitioner had approached even this Court for bail pending trial and copy of the order of turning down the bail plea is produced with the petition at pg.35. The bail application preferred by the petitioner has been dismissed on account of withdrawal of the bail application. According to Mr.Gondaliya, this bail application was preferred after filing of the chargesheet and that too in the month of January/February, 2004. So there is no scope for the petitioner to file any successive bail application and this fact was very well available with the Detaining Authority as well as the sponsoring authority, even then the order of preventive detention is passed mechanically. So on this sole count, the impugned order should be quashed and set aside.

9. Mr.Gondaliya, learned counsel appearing for the petitioner, has rightly argued that under the guise of pendency of the present petition and order of preventive detention, the trial Court is not proceeding with the trial on merit and this has caused serious prejudice to the petitioner and therefore only, the petitioner insists that an illegality should not be permitted to sustain any further.

10. So on the above ground, the Court is accepting the say of the petitioner that the authority has committed grave error in recording subjective satisfaction that the activities of the petitioner are prejudicial to the maintenance of public order. Obviously, therefore, it was erroneous to exercise privilege vested with the authority under the Act. The Court has also considered the statement made by Mr.Gondaliaya on behalf of the petitioner that the petitioner is ready to file an undertaking before the trial Court on the first date of hearing of the trial, which is pending against him, that the petitioner shall not file any bail application pending trial. So without entering into the merits of other grounds mentioned in the memo of the petition, the order of detention is required to be quashed and set aside.

11. In view of the above, the petition is hereby allowed. The order of detention dated 18th March, 2004, passed by the respondent no.1 herein, is hereby ordered to be quashed and set aside and the petitioner-detenu is hereby ordered to be set at liberty forthwith, if no longer required in any other case, on a condition that the petitioner-detenu shall file an undertaking before the concerned trial Court on the first date of hearing of the trial, pending against him that he shall not file any bail application pending trial as committed before this Court.

It is clarified that the statement made by the learned counsel appearing for the petitioner before the Court that the petitioner shall not file any bail application is without prejudice to the rights and contentions that the petitioner may make on merit pending trial.

Rule is made absolute with no order as to costs. Direct Service is permitted.

(C.K. Buch, J)

Aakar